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No. 10

In the Supreme Court of the United States

October Term, 1955

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

STEVE NELSON,
Respondent

CERTIORARI TO SUPREME COURT OF PENNSYLVANIA

BRIEF FOR PETITIONER

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INDEX

	Page
Opinions of Court Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented for Review	5
Statement of the Case	6
Summary of Argument	13
Argument	17
I. A State may punish acts committed within its territory, which advocate the overthrow of the government of the United States by force or violence	17
Self-preservation is the most essential right of sovereignty	24
II. Section 2385 of the Federal Criminal Code of June 25, 1948, embodying the Smith Act, does not supersede the Pennsylvania Sedition Act	34
(a) Section 2385 expresses no intent to supersede the Pennsylvania Sedition Act	34
Letter of Representative Smith	36, 37
Gilbert v. Minnesota rules this case	38
(b) There is no conflict between the Federal Act and the Pennsylvania Act	43
(c) The Federal Government has never taken the position that the Smith Act superseded the Pennsylvania Sedition Law	44

(d) No decision holds that a State statute making an act a crime is superseded by an Act of Congress making the same act a crime 45

Hines v. Davidowitz was based solely on special ground that the registration of aliens by Pennsylvania would interfere with the foreign relations of the United States 47

Each of the decisions cited in the majority opinion was concerned with conflicts between regulatory, not criminal, provisions 53

The Federal Constitution left the administration of criminal justice with the states 56

Section 3231 of the Federal Code of Crimes expresses clearly the intent not to supersede the Pennsylvania Sedition Act 60

III. The defendant was not placed in double jeopardy 63

IV. The decision of the Supreme Court of Pennsylvania should be reversed 67

TABLE OF CITATIONS

CASES.

Allen-Bradley Local v. Board, 315 U. S. 740 ..... 36, 48, 54, 55

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767 ..... 42, 56

Bethlehem Steel Co. v. State Board, 330 U. S. 767 50

Boyd v. Thayer, 143 U. S. 135 32

Charleston and Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U. S. 597 54

Cloverleaf Co. v. Patterson, 315 U. S. 148 ..... 41, 53
Cohens v. Virginia, 19 U. S. (6 Wheat.) 264 46
Commonwealth v. Lazar, 103 Pa. Superior Ct. 417 21
Commonwealth v. Widovich, 295 Pa. 311 21
Cummings v. Missouri, 71 U. S. (4 Wall.) 277 24
DeJonge v. Oregon, 299 U. S. 353 21
Dennis v. United States, 341 U. S. 494 ..... 25, 26
Galvan v. Press, 347 U. S. 522 49
Gilbert v. Minnesota, 254 U. S. 25 ..... 14, 19, 26, 29, 63
Gitlow v. New York, 268 U. S. 652 ... 17, 21, 26, 27, 35
Gustafson v. Rhinow, 144 Minn. 45 29
Harisiades v. Shaughnessy, 342 U. S. 580 51
Hebert v. Louisiana, 272 U. S. 312, 314 64
Hill v. Florida, 325 U. S. 535 ..... 50, 55
Hines v. Davidowitz, 312 U. S. 52 ... 15, 45, 47, 56, 59
Irvine v. California, 347 U. S. 128, 134 59
Jerome v. United States, 318 U. S. 101 .. 44, 56, 59, 65
Kelly v. Washington, 302 U. S. 1 41
Lazar v. Pennsylvania, 286 U. S. 532 22
Luther v. Borden, 48 U. S. (7 How.) 1 32
Malinsky v. New York, 324 U. S. 401 ..... 58, 59
Missouri, Kansas and Texas Ry. Co. v. Haber, 169 U. S. 613, 623 41
Missouri, Kansas and Texas Railway Company v. Harris, 234 U. S. 412, 419 41
Munn v. Illinois, 94 U. S. 113 24
Napier v. Atlantic Coast Line, 272 U. S. 605 55
Nelson v. Wyman, 99 N.H. 33, 105 A. 2d 756 ... 22, 39
New York Central Railroad Co. v. Winfield, 244 U. S. 147 55
Parker v. Brown, 317 U. S. 341 25
Pennsylvania Railroad Co. v. Public Service Commission of Pennsylvania, 250 U. S. 566 54

People v. Lloyd, 304 Ill. 23, 136 N.E. 505 30
People of State of California v. Zook, 336 U. S. 844 (1949) 43
Reid v. Colorado, 187 U. S. 137, 148 41
Rice v. Santa Fe Elevator Corp., 331 U. S. 218 53
Rochin v. California, 342 U. S. 165 ..... 57, 59
Savage v. Jones, 225 U. S. 501 ..... 46, 56
Schwartz v. Texas, 344 U. S. 199 42
Sinnot v. Davenport, 63 U. S. (22 How.) 227 ... 41
Southern Railway Co. v. Railroad Commission of Indiana, 236 U. S. 439 54
State of Ohio v. Raley et al. (not yet reported) 40
State v. Tachin, 92 N.J. Law 269, 106 Atl. 145 .. 22
Stromberg v. California, 283 U. S. 359 20
Takahaski v. Fish and Game Commission, 334 U. S. 410 49
Turner v. Williams, 194 U. S. 279 25
Twining v. New Jersey, 211 U. S. 78 24
United States v. Lanza, 260 U. S. 377 ..... 63, 64, 66
United States v. Marigold, 9 How. 560 43
United States v. Pink, 315 U. S. 203 48
Whitney v. California, 274 U. S. 357 ..... 19, 21, 26
Zina v. Pennsylvania, 280 U. S. 518 21

STATUTES:

Federal Code of Crimes and Criminal Procedure:
Section 2385 ..... 2, 14, 34, 60, 61, 62, 67
Section 3231 ..... 16, 60, 61
Pennsylvania Penal Code, Section 4207 (Sedition Act) 3, 21, 67

CONSTITUTION:

Constitution of the United States:
Article IV, Section 4 ..... 14, 31
Amendment V, double jeopary 16, 63, 66

OPINIONS OF COURTS BELOW

The opinion of the Court of Quarter Sessions of Allegheny County, Pennsylvania (R. 28), is not separately reported, but is incorporated as part of the opinion of the Superior Court of Pennsylvania (R. 50) reported in 172 Pa. Superior Ct. 125, 92 A. 2d 431. The opinion of the Supreme Court of Pennsylvania (R. 50) is reported in 377 Pa. 38, 104 A. 2d 133. The order of the Supreme Court of Pennsylvania denying the petition by the Commonwealth of Pennsylvania for reargument is noted in 377 Pa. at page 60.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 25, 1954. The order of the Supreme Court of Pennsylvania denying the petition by the Commonwealth of Pennsylvania for rehearing was entered on April 27, 1954.

The petition for writ of certiorari was filed on July 24, 1954, in the office of the Clerk of this Court, and was granted on October 14, 1954.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

STATUTES INVOLVED

Section 2385 of the Federal Code of Crimes and Criminal Procedure of June 25, 1948, 62 Stat. 808, 18 U.S.C.A. 2385:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of,

or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000, or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

Section 4207 of the Pennsylvania Penal Code of June 24, 1939, 18 Purd. Penna. Stat. Ann. 4207:

"The word 'sedition', as used in this section, shall mean:

"Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in connection or combination with any other person, the intent of which is:

"(a) To make or cause to be made any outbreak or demonstration of violence against this State or against the United States.

"(b) To encourage any person to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States.

"(c) To incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt.

"(d) To incite any person or persons to do or attempt to do personal injury or harm to any officer of this State or of the United States, or to damage or destroy any public property or the property of any public official because of his official position.

"The word 'sedition' shall also include:

"(e) The actual damage to, or destruction of, any public property or the property of any public official, perpetrated because the owner or occupant is in official position.

"(f) Any writing, publication, printing, cut, cartoon, or utterance which advocates or teaches the duty, necessity, or propriety of engaging in crime, violence, or any form of terrorism, as a means of accomplishing political reform or change in government.

"(g) The sale, gift or distribution of any prints, publications, books, papers, documents, or written matter in any form, which advocates, furthers or teaches sedition as hereinbefore defined.

"(h) Organizing or helping to organize or becoming a member of any assembly, society, or group whose any of the policies or purposes thereof are seditious as hereinbefore defined.

"Sedition shall be a felony. Whoever is guilty of sedition shall, upon conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), or to undergo imprisonment not exceeding twenty (20) years, or both."

QUESTIONS PRESENTED FOR REVIEW

1. Does a state have the power to enact a sedition law making criminal acts committed within its territory which advocate overthrowing of the government of the State or the United States by force and violence?

2. Did the Smith Act of June 28, 1940, as later codified in the Federal Criminal Code of June 25, 1948 (18 U.S.C.A. 2385), which made such acts a crime, supersede the Pennsylvania Sedition Act of June 26, 1919, later codified as Section 207 of the Pennsylvania Penal Code of June 27, 1939 (Pamphlet Laws 872, 18 Purd. Penna. Stat. Ann. Section 4207)?

3. Did the fact that the respondent was later convicted in the United States District Court for the Western District of Pennsylvania under the Federal Criminal Code amount to double punishment for the same offense, or place the respondent in double jeopardy?

STATEMENT OF THE CASE

On October 17, 1950 (R. 9), in the Court of Quarter Sessions, Allegheny County, Pennsylvania, the respondent, Steve Nelson, was indicted under the Pennsylvania Sedition Act (Sec. 207 of Pennsylvania Penal Code of June 24, 1939, Pamphlet Laws 872, 18 Purdon's Stat. Ann. Sec. 4207).

The indictment charged, inter alia, that the defendant, Steve Nelson:

Encouraged persons to engage in conduct with a view to overthrowing and destroying by force the government of Pennsylvania and of the United States (R. 9).

Published and distributed printed matter encouraging persons to engage in conduct with a view to overthrowing and destroying by force the government of Pennsylvania and of the United States (R. 11-12).

The indictment further charged that such publications proclaimed that:

The dictatorship of the proletariat cannot arise by peaceful development, but can arise only as a result of smashing the bourgeois State machine and the bourgeois army (R. 15).

This Soviet organization alone is capable of smashing and finally destroying the bourgeois and bureau-

cratic and judicial apparatus and this can be done only by revolution (R. 15):

> "The dictatorship of the proletariat cannot arise as the result of the peaceful development of bourgeois society and of bourgeois democracy; it can arise only as the result of the smashing of the bourgeois state machine, the bourgeois army, the bourgeois bureaucratic machine, the bourgeois police.
>
> "The Society organization of the state alone is capable of immediately and effectively smashing and finally destroying the old, i.e., the bourgeois, bureaucratic and judicial apparatus.
>
> "The bourgeois state can only be 'put an end to' by a revolution.
>
> "The replacement of the bourgeois by the proletarian state is impossible without a violent revolution." (R. 15)

Voting alone for the communist program is not sufficient to overthrow the dictatorship of the capitalist class in the fight to establish the dictatorship of the proletariat in the United States (R. 15 16).

> "* * * the Communists everywhere support every revolutionary movement against the existing social and political order of things. * * *" (R. 16)
>
> "The Communists * * * openly declare that their ends can be attained only by the forcible overthrow of all existing and social conditions. Let the ruling classes tremble at a Communist revolution." (R. 16)

"First dogma: concerning the conditions for the seizure of power by the proletariat. The opportunists assert that the proletariat cannot and ought not to take power unless it constitutes a majority in the country. No proofs are adduced, for there are no proofs, either theoretical or practical, that can justify this absurd thesis. Let us assume that this is so, Lenin replies to these gentlemen of the Second International; but suppose a historical situation has arisen [fol. 15] (a war, an agrarian crisis, etc.) in which the proletariat, constituting a minority of the population, has an opportunity to rally around itself the vast majority of the labouring masses; why should it not take power then?

"Does not the history of the revolutionary movement show that the parliamentary struggle is only a school for and an aid in organizing the extra-parliamentary struggle of the proletariat, that under capitalism the fundamental problems of the working-class movement are solved by force, by the direct struggle of the proletarian masses, their general strike, their insurrection?" (R. 17)

"The Communist Party of the United States holds the view that only in the measure in which we become a Bolshevik Party do we fulfill our tasks as a Communist Party." (R. 19)

"Our Party is the United States Section of the Communist International which is a world Communist Party and each one of us is therefore a

member of a world Party. In this lies the greatest hope and promise of success for the world's proletarian revolution and all oppressed and exploited in their struggle against capitalism." (R. 19)

"Strong with bolshevik self-criticism, boldly exposing, criticizing, and correcting the past and present errors, the American Party will follow the path of bolshevization enlightened by Stalin's speeches, and will be worthy of Stalin's definition of our Party as 'one of the few Communist Parties in the world upon which history has laid tasks of a decisive character from the point of the world revolutionary movement.'" (R. 19).

"Marx and Engels taught that it was impossible to get rid of the power of capital and to convert capitalist property into public property by peaceful means, and that the working class could achieve this only by revolutionary violence against the bourgeoisie, by a Proletarian Revolution, by establishing its own political rule—the dictatorship of the proletariat—which must crush the resistance of the exploiters and create a new, classless, Communist society." (R. 19)

"Hence the transition from capitalism to Socialism and the liberation of the working class from the yoke of capitalism cannot be effected by slow changes, by reforms, but only by a qualitative change of the capitalist system, by revolution." (R. 19).

"American capitalism is like a sort of monster parasite, living on the body of the rest of world

capitalism; [fol. 18] it is cannibalistically devouring the other capitalist countries and growing fat upon their life substance." (R. 19)

"American imperialism is like a monstrous, all-consuming spider. It has sucked up most of the available gold supplies of the capitalist world and hoarded them away at Fort Knox; it has made nearly every capitalist nation in the world its debtor; it is stripping the various capitalist nations of their foreign markets, of their economic strength, and of their national independence. It has set up a more or less definite politic control over all the important capitalist countries in the world. Now it is stretching out its claws for the U.S.S.R., the European new democracies, and the colonial and semi-colonial countries, in the hope that it can overwhelm them and devour them at its leisure. This is the parasitic, cannibalistic role of American capitalism in the world today." (R. 20)

"Under the leadership of the great Stalin, forward to victory of Communism." (R. 20)

"The proletarian revolution is impossible without the forcible destruction of the bourgeois state machine and the substitution for it of a New one." (R. 20)

The indictment quoted many additional passages from publications which, it charged, were distributed by the defendant (R. 17-20).

The defendant pleaded not guilty (R. 7) and on December 23, 1950, filed a motion (R. 24) to quash the

indictment upon the grounds, inter alia, that the Pennsylvania Sedition Act of 1939 offended Amendment XIV of the Constitution of the United States by depriving citizens of their liberties and property without due process of law and punishing the defendant for exercising the freedom of speech, press and assembly; and was superseded by the Federal Sedition Act of June 25, 1948, 18 U.S.C.A. Sec. 2384-5-6, which, the motion asserted, completely occupied this field of legislation (R. 25).

By order of December 26, 1950, this motion to quash was dismissed (R. 28). After a trial beginning on December 4, 1951, and ending on January 30, 1952, a verdict of guilty on twelve counts was returned by the jury on January 30, 1952 (R. 7).

Defendant's motions for a new trial and in arrest of judgment were denied (R. 49) in an opinion (R. 28) filed by Judge Montgomery on June 26, 1952.

The defendant, Nelson, was sentenced to pay a fine of $10,000, the costs of prosecution, and to undergo imprisonment for a term of 20 years (R. 8).

The judgment of sentence by the Court of Quarter Sessions was affirmed by the Superior Court on November 12, 1952 (R. 50). On appeal the Supreme Court reversed on the ground that the Smith Act superseded the Pennsylvania Sedition Act, and conviction in the state court would result in double punishment (R. 50, 377 Pa. at 71). The majority opinion was written by Mr. Justice Jones and the concurring opinion (R. 64) was filed by Chief Justice Stern and Justices Stearne and Chidsey. Mr. Justice Bell dissented (R.

64). Justices Musmanno and Arnold took no part (R. 63). A petition for reargument was denied on April 27, 1954.

The petition for certiorari was filed on July 24, 1954, and granted on October 14, 1954.

SUMMARY OF ARGUMENT

The Commonwealth of Pennsylvania has power to make it a crime to commit within its territory, acts which advocate the overthrow of the government of the United States by force or violence. This principle is firmly established by the decisions of this Court and of the courts of Pennsylvania and other states.

The power to prohibit such acts is a part of the right of self-preservation which is an essential part of the sovereignty of a state. The right of a state to self-preservation has been upheld in numerous opinions of this Court.

Acts in Pennsylvania advocating a movement to overthrow the government of the United States would result in wide spread destruction of lives and property of Pennsylvania citizens, and would seriously disturb the peace of the Commonwealth. One of the first objectives would probably be to seize or destroy Pennsylvania's vast facilities for production of munitions and implements of war and the means of transportation.

The police power gives to the Commonwealth the inherent right to suppress such insurrection and to enact laws for the punishment of the offenders.

Pennsylvania alone has a police organization to protect lives and property. The Federal government provides no such organization or protection.

There are city, county and state police on duty to suppress such attacks. If the local police are inadequate, the mayor or sheriff can call upon the Governor, and he can send the State Police or National Guard. These officers must have a State law which they can enforce and under which they can arrest and prosecute.

The State and the United States are part of a dual system of government. The Federal Constitution looks to an indestructible union of indestructible states.

Under Section 4 of Article IV of the Federal Constitution, the Federal government has power to protect against domestic violence only on application of the Legislature or the executive of the State.

Section 2385 of the Federal Criminal Code, embodying the Smith Act, did not supersede the Pennsylvania Sedition Act because:

(a) No provision or word of Section 2385 expresses an intent to supersede the Pennsylvania Statute. If Congress had intended to supersede completely and put an end to the enforcement of state seditions laws, it would have declared this unequivocally. Its enactment would not have been one merely of silent duplication.

(b) There is no conflict between the Federal act and the Pennsylvania act.

In *Gilbert v. Minnesota*, 254 U. S. 25, this Court held that a Minnesota statute which made it unlawful to advocate that men should not enlist in the military forces of the United States,

was not superseded by the Federal Espionage Act of 1917. Recent rulings of the Courts of New Hampshire and Ohio are to the same effect. This Court held in numerous decisions that the exercise of a state of its police power is superseded by an act of Congress only where the conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

(c) The provisions of the Smith Act have been in force since 1940, and no Federal Court has questioned the validity of a State Sedition Law or held that it was superseded by Federal legislation.

(d) No decision of this Court holds that a State statute making an act, such as sedition, a substantive crime is superseded by an act of Congress making the same act a crime. Each statute creates a separate crime against a different sovereign. The decisions in which this Court has found a supersedure have involved statutes which are primarily regulatory, and the criminal provisions are added merely as a penalty in order to compel obedience to a regulation. The question has been whether the regulatory provisions are in conflict. The Smith Act is not part of a departmental or regulatory system.

The ruling in *Hines v. Davidowitz*, 312 U. S. 52, was based solely on the ground that the Federal government had exclusive power over foreign relations and registration of aliens by Pennsylvania would interfere with such foreign relations.

Each of the decisions cited by the court below on the question of supersedure was concerned with a conflict between *regulatory*, not *criminal*, provisions.

The Federal Constitution provided for no criminal code, and there is no Federal common law of crimes. Congress has power to define crimes only as a means for carrying into execution its limited grant of legislative power.

Section 3231 of the Federal Code of Crimes expresses the intent not to supersede the criminal laws of the states. It provides that nothing in the Code shall be held to take away or impair the jurisdiction of the courts of several states under the laws thereof.

The defendant was not placed in double jeopardy. A crime under the Smith Act and a crime under the Pennsylvania Sedition Law are not "the same offense" within Amendment V. The conviction in a state court preceded a conviction in a Federal Court. Amendment V is a restriction upon the Federal government only.

Petitioner requests this Court to decide that the Federal act did not supersede the Pennsylvania Sedition Law, and reverse the decision of the Supreme Court of Pennsylvania.

ARGUMENT

I.

A State may punish acts committed within its territory, which advocate the overthrow of the government of the United States by force or violence.

This principal is firmly established by the decisions of this Court and of the courts of many states.

In *Gitlow v. New York*, 268 U. S. 652 (1925), in upholding a New York statute which provided that any person who "advocates * * * the overthrowing or overturning of organized government by force or violence" shall be guilty of a felony, this Court, by Mr. Justice Sanford, said:

> "* * * And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of **government of the United States and the several States**, by violence or other unlawful means. People v. Lloyd, 304 Ill. 23, 34. See also, State v. Tachin, 92 N.J.L. 269, 274; and People v. Steelik, 187 Cal. 361, 375. In short this freedom [of speech] does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied." * * *
>
> * * * * * * *

* * * **That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil** to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the **immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen.** The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It **cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction**; but it may, in the exercise of its judgment, **suppress the threatened danger in its incipiency.** In People v. Lloyd, supra, p. 35, it was aptly said: 'Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without

waiting until there is a present and imminent danger of the success of the plan advocated.' * * * '" (668, 669) (Emphasis added).

In *Whitney v. California*, 274 U. S. 357 (1927), this Court sustained the constitutionality of a California statute which made it a felony for anyone to knowingly become a member of any organization advocating unlawful acts of force and violence as a means of accomplishing change in industrial ownership or any political change.

This Court said:

"* * * that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. Gitlow v. New York, 268 U. S. 652, 666-668, and cases cited." (371)

In *Gilbert v. Minnesota*, 254 U. S. 325 (1920), a Minnesota statute making it a misdemeanor to advocate that citizens of the State should not aid or assist the United States in prosecuting or carrying on a war, was held to be constitutional. This Court said that the State:

"* * * has power to regulate the conduct of its citizens and to restrain the exertion of baleful influences against the promptings of patriotic duty to the detriment of the welfare of the Nation and State. To do so is not to usurp a National power,

it is only to render a service to its people, as Nebraska rendered a service to its people when it inhibited the debasement of the flag.

"We concur, therefore, in the final conclusion of the court, that the State is not inhibited from making 'the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.'

"The statute, indeed, may be supported as a simple exertion of the police power to preserve the peace of the State. * * * It is simply a local police measure, aimed to suppress a species of seditious speech which the legislature of the State has found objectionable. * * * On such occasions feeling usually runs high and is impetuous; there is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such result or a danger of it is a proper exercise of the power of the State. * * * " (331-332)

In *Stromberg v. California*, 283 U. S. 359 (1931), Chief Justice Hughes said of the freedom of speech:

"* * * The right is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom. There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overflow of organized government by unlawful means. There is no constitutional im-

munity for such conduct abhorrent to our institutions. * * * " (368-369)

In *De Jonge v. Oregon*, 299 U.S. 353 (1937), Chief Justice Hughes again said:

> " * * * the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application. * * * " (363)

Several decisions of Pennsylvania courts have upheld the constitutionality of the Sedition Act of June 26, 1919, Pamphlet Laws page 639, the language of which is in substance the same as Section 4207 of the Pennsylvania Penal Code of 1939, which is quoted, supra, page 3:

Commonwealth v. Widovich, 295 Pa. 311 (1929), in which the court quoted and followed the language of this Court in

Whitney v. California, quoted, supra, page 19.

This Court denied certiorari in

Zina v. Pennsylvania, 280 U. S. 518 (1929).

Commonwealth v. Lazar, 103 Pa. Superior Ct. 417 (1931) which quoted and followed the language of this Court in

Gitlow v. New York, quoted supra, page 17.

This court dismissed appeal in

Lazar v. Pennsylvania, 286 U. S. 532 (1932).

In *State v. Tachin*, 92 N. J. Law 269, 106 Atl. 145 (1919), the Supreme Court of New Jersey upheld a State statute, which made it a crime to attempt by speech to incite hostility and opposition to the government of the United States. That Court said:

> "* * * If the federal government, which is a government of delegated powers only, under the Tenth Amendment to the federal Constitution, can properly protect by its criminal law the honesty and purity of elections, as the Siebold Case decided, much more can the State government protect its own existence against sedition which, although aimed directly at the federal government, must indirectly affect the security of the state government. * * *"

A writ of error to this Court was dismissed with costs on motion of counsel for plaintiffs in error (254 U. S. 662).

In *Nelson v. Wyman*, 99 N.H. 33, 105 A. 2d 756, decided on April 30, 1954, the plaintiff filed a petition with the Supreme Court of New Hampshire asking for declaratory judgment that the Subversive Activities Act of that state was unconstitutional. This Act of 1951 provided that:

> "It shall be a felony for any person knowingly and willfully to
>
> "(a) commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, de-

struction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force or violence, or

"(b) advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the state of New Hampshire or of any political subdivision of either of them; * * *" (N.H. Laws, 1951, pp. 412-413)

The Supreme Court of New Hampshire ruled that the statute was constitutional, saying:

"* * * Whatever importance has been ascribed to these duties and powers in decisions dealing with federal legislation, their existence has not been applied in connection with state legislation, to exclude consideration of the well recognized power of each state to regulate the conduct of its citizens and to restrain activities which are detrimental not only to the welfare of the state but of the nation. 'The state is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.' Gilbert v. Minnesota, 254 U. S. 325, 331. 'There is nothing in the federal constitution in any way granting to the federal government the exclusive right to punish disloyalty.' People v. Lloyd, 304 Ill. 23, 33."

Self-preservation is the most essential right of sovereignty.

In order to function, a state must exist and must have power to defend itself against efforts to overthrow it by force and to punish the guilty participants.

The rule as to the sovereignty of the states has been expressed in opinions throughout the history of this court.

In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), Mrs. Justice Field stated:

> "We admit the propositions of the counsel of Missouri, that the States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; that they still retain those attributes, except as they have been surrendered by the formation of the Constitution, and the amendments thereto; * * * " (318-319)

In *Munn v. Illinois*, 94 U.S. 113 (1876), Chief Justice Waite said:

> " * * * the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions." (124)

In *Twining v. New Jersey*, 211 U.S. 78 (1908), Mr. Justice Moody said:

"* * * in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in Hurtado v. California * * *" (106).

A similar thought was expressed in *Parker v. Brown*, 317 U.S. 341 (1943) by Chief Justice Stone:

"* * * In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (351)

In *Dennis v. United States*, 341 U.S. 494 (1951), Mr. Justice Frankfurter said:

"* * * The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty. * * *" (519)

In *Turner v. Williams*, 194 U. S. 279 (1904), Chief Justice Fuller in sustaining the Alien Immigration Act of 1903, said:

"* * * as long as human governments endure they cannot be denied the power of self-preservation, as that question is presented here." (294)

We repeat again the language of Mr. Justice Sanford in *Gitlow v. New York*, 268 U.S. 652 (1925):

> "* * * In short this freedom [of speech] does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied. * * *" (p. 668).

To the same effect are:

Whitney v. California, 274 U.S. 357 (1927), quoted supra, page 19.

Gilbert v. Minnesota, 254 U.S. 325 (1920) quoted, supra, page 19.

Acts in Pennsylvania fomenting an insurrection against the government of the United States or instituting a movement to overthrow the government of the United States, would seriously affect and disturb the peace and dignity of the Commonwealth of Pennsylvania; and would result in wide-spread destruction of lives and property of Pennsylvania citizens. Such acts might lead to the use of explosives and incendiary bombs, and sabotage of airplanes and railroad trains and widespread violations of the laws of Pennsylvania.

The Commonwealth of Pennsylvania would not be required by anything in the Federal law to keep hands completely off and leave the preservation of peace and order entirely to Federal authorities.

This Court has frequently said that the national or the state government need not wait until the subversive group has perfected its plan and only the signal is awaited for the blow to be struck: *Dennis v.*

United States, 341 U.S. 494, 509 (1951); *Gitlow v. New York*, 268 U.S. 652, 669 (1925). They may make it a crime to advocate such measures.

An attempt to overthrow the Federal government would begin with, or at least involve, the overthrow of State governments. The fact that the primary or ultimate goal was to overthrow the Federal government would not soften the impact of a blow against the State government or lessen the slaughter of human beings or destruction of property in the State. The revolution would have to begin in one or more states. One of the first objectives would be to wreck and destroy Pennsylvania's vast facilities for production of munitions and implements of war and the means of transportation.

The police power—the right of self preservation gives to the Commonwealth of Pennsylvania the inherent and undoubted power to suppress such insurrection, and to enact laws for the punishment of offenders.

Pennsylvania does not have to depend wholly upon acts of the Federal government in the prosecution of the guilty any more than its police and soldiers are required to stand by and wait for the Federal forces to arrive and defend.

Pennsylvania has the right to protect human lives and property within its boundaries and this right the Smith Act does not, indeed, cannot, take away or impair.

Pennsylvania alone has a police organization, a law-enforcing body to protect lives and property.

The Federal government provides no such organization or protection. Its Federal Bureau of Investigation is most efficient, but it is essentially an information-gathering agency, it is not stationed in every state to protect life and property against attacks by force and violence.

If a movement is begun in one of the large industrial area, such as Philadelphia or Pittsburgh, to seize or destroy ammunition plants, there are local city, county and state police on duty night and day to halt and suppress the attacks. If the local police are not sufficient, the mayor or the sheriff can call upon the Governor and he can send the state police or national guard.

These officers must have a state law which they can enforce and under which they can arrest and prosecute. It must be a law which enables enforcement officials of a state to step in and halt the movement before it has gathered force and numbers and wrought destruction. In order to do this, there must be a law which prohibits the advocacy of such subversive activity.

In discussing the power of the state to make it a crime to advocate the overthrow of the government of the United States, it has frequently been pointed out that the state is a part of the system of government which was created by the Constitution of the United States. Our government has been called a dual system, but it still is one government. This Court has frequently said that the constitution looks to an indestructible union of indestructible states.

Both state and federal branches are essential to constitute the complete system of government.

Thus, in *Gilbert v. Minnesota*, 254 U. S. 325 (1920), quoted supra, Mr. Justice McKenna said:

> "* * * The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned. * * * this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all. * * *" (329)

In the footnote to page 330 of this opinion, this Court cited and quoted from *Gustafson v. Rhinow*, 144 Minn. 45, as follows:

> "In Gustafson v. Rhinow, 144 Minnesota, 415, the Supreme Court of Minnesota sustained a law of the State giving to soldiers who served in the war against Germany $15 for each month or fraction of a month of service, against an attack that the soldiers were soldiers of the United States. The court expressed the concern and interest of the state as follows: 'It is true that the Federal government alone has power to declare war, but having done so, the government and people of Minnesota became bound to defend and support the national government. While the states of the nation are sovereign in a certain

field, they are also members of the family of states constituting the national organization.'"

In *People v. Lloyd*, 304 Ill. 23, 136 N.E. 505 (1922), in holding constitutional a statute which made it a felony to advocate the overthrow by violence or other unlawful means of the form of government secured to citizens of the United States and of the several states, the Supreme Court of Illinois said:

> "* * * The citizens of this state are citizens of the United States, and the citizens of the United States residing within the borders of this state are citizens of this state. Each citizen owes a duty to these two separate sovereignties. The state is a part of the nation, and owes a duty to the nation to support the efforts of the national government to secure the safety and protect the rights of its citizens, and to preserve, maintain, and enforce the sovereign rights of the nation against public menace, and to that end the state may require its citizens to refrain from any act which will interfere with or impede the national government in effectively defending itself against such public enemies. It is the duty of all citizens of the state to aid the state in performing its duty as a part of the nation, and the fact that such citizens are also citizens of the United States and owe a direct duty to the nation does not absolve them from their duty to the state or preclude the state from enforcing such duty. * * *" (p. 511)

The majority opinion in the court below states (R-58) that the duty of suppressing insurrections in

a state rests directly upon the government of the United States, by virtue of Section 4 of Article IV of the Federal Constitution which provides:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

The learned justice further states:

> "* * * Federal pre-emption could hardly be more clearly indicated." (R-58)

With all deference, we submit on the contrary that:

(1) The duty to "protect" is limited to protection against "invasion," that is, attacks from without.

(2) The duty of the Federal government to protect against "domestic violence", arises only "on application of the Legislature or of the executive". The necessity of an application from a state necessarily implies that the state has the power to defend itself and will do so unless the violence reaches a point where the state is obliged to call upon the Federal government.

There is no evidence or question of invasion in this case. The duty of the federal government to protect the state against domestic violence is not absolute, but is conditioned upon an application of the Legislature or executive.

This provision evinces no intention to deprive the state of the power of self preservation.

In the historic decision of *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), Chief Justice Taney said:

> "* * * * The first clause of the first section of the act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. The power given to the President in each case is the same—with this difference only, that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of the State. * * *
>
> "* * * * And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. * * * *" (44-45)

In *Boyd v. Thayer*, 143 U.S. 135 (1892), Mr. Justice Field in his dissenting opinion said:

> "* * * * In all these particulars the States, to use the language of Mr. Justice Nelson, are as independent of the general government as that government within its sphere is independent of the States. Its power of interference with the administration of the affairs of the State and the

officers through whom they are conducted extends only so far as may be necessary to secure to it a republican form of government, and protect it against invasion, and also against domestic violence on the application of its legislature, or of its executive when that body cannot be convened. Const. Art. IV, sec. 4. * * *" (183)

II.

Section 2385 of the Federal Criminal Code of June 25, 1948, embodying the Smith Act, does not supersede the Pennsylvania Sedition Act (Section 207 of the Pennsylvania Penal Code of June 24, 1939).

In support of this propostion, we submit the following:

(a) No provision or word of Section 2385 expresses any intent whatever to supersede the Pennsylvania statute.

Under this Point I we have quoted at length the decisions of this Court and of the state courts, which establish beyond question that a state has power to enact and enforce a statute making it a crime to advocate the overthrow of the government by force and violence. This principle was well established when Congress enacted the Smith Act.

The states have always had and still have the power of self-preservation, and this includes the power to prohibit advocating the overthrow of the government by force and violence.

This fundamental principle was so well established and so well known to Congress, when it adopted the Smith Act, that we cannot believe that it had any intention to supersede the Pennsylvania Sedition Law. This principle is so fundamental that to alter

it would radically change the dual character of our government.

For Congress to occupy the field and supersede the State Sedition Law would completely reverse the well established principle just discussed and deprive the State of the right to protect its very existence, its right of self-preservation.

In the Smith Act of 1940, Congress substantially duplicated the New York statute which is quoted in *Gitlow v. New York*, 268 U.S. 652 (1925). Congress knew that this statute was in force in New York. The decisions of this Court had left no doubt that the states retain power to prohibit and punish sedition. If Congress had intended to completely supersede and put an end to the enforcement of the state sedition laws, its enactment would not have been one of silent duplication. If Congress had planned to create a void in the law enforcement of the State, it would have declared unequivocally that thereafter the Federal government alone could prosecute and punish for sedition. It would not have stripped the states of the power of self-preservation silently and without warning to the states that thereafter Congress should have the sole and exclusive power to prohibit sedition and that every state was powerless to act against an attempt to overthrow it by force and violence.

A more far reaching invasion of the sovereignty of the State and seizure of the powers of the State, as we submit, have never been suggested.

If Congress had intended to work such a complete cataclysm in the structure of our dual form of gov-

ernment, it would have been its bounded duty to declare such purpose in no unmistakable language.

We have no hesitation in saying that Congress would have declared such intent.

Furthermore, having superseded the sedition laws of the states, it would have been imperatively necessary for Congress to provide some more complete method of protection to life and property than simply a criminal prosecution.

As was said by Mr. Justice Douglas in

Allen-Bradley Local v. Board, 315 U.S. 740 (1942):

> "We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard" (749).

The intention of Congress in adopting the Smith Act is definitely expressed in a letter of its author, Representative Smith, which is quoted in a dissenting opinion as follows:

> "Howard W. Smith,
> 8th District Virginia.
> Committee on Rules
>
> Calvin H. Haley,
> Secretary.
>
> Congress of the United States
> House of Representatives
> Washington, D. C.

February 4, 1954.

Honorable Frank Truscott,
Attorney General of Pennsylvania,
Department of Justice,
Harrisburg, Pennsylvania
Dear Mr. Attorney General

. . . . . .

As I am the author of the Federal act in question, known as the Smith Act, I am deeply disturbed by the implications of this decision. May I say that when I read this opinion, it was the first intimation I have ever had, either in the preparation of the act, in the hearings before the Judiciary Committee, in the debates in the House, or in any subsequent development, that Congress ever had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign states to pursue also their own prosecutions for subversive activities. It would be a severe handicap to the successful stamping out of subversive activities if no state authority were permitted to assist in the elimination of this evil, or to protect its own sovereignty. The whole tenor and purpose of the Smith Act was to eliminate subversive activities, and not assist them, which latter might well be the effect of the decision in the Commonwealth v. Nelson case.

[fol. 121] "I hope you will not think me presumptuous in taking this matter up with you, but you can readily understand how deeply disturbed I am about . . .

Sincerely yours,
Howard W. Smith."
(R. 75-76)

The decision of this Court in Gilbert v. Minnesota, 254 U.S. 325, decided in 1920, rules the instant case

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In that case, this Court held that Section 3 of the Federal Espionage Act of June 5, 1917 (40 Stat. 217), did not supersede the statute of Minnesota.

Section 3 of the Espionage Act provided:

> "* * * whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting of enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." (p. 219)

The Minnesota statute provided:

> "* * * It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States * * *
>
> "* * * It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States.'" (pp. 326-327)

The appellant specifically objected that the Minnesota statute was superseded by the Federal act.

In holding that the Federal statute did not supersede, this Court said:

> "* * * The same view of the statute was expressed in State v. Holm, 139 Minnesota, 267, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, abrogated or superseded the statute, the court declaring that the fact that the citizens of the State are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a State from enforcing such duty. **'The same act'** it was said, **'may be an offense or transgression of the laws of both' Nation and State, and both may punish it without conflict of their sovereignties.** * * *" (Emphasis supplied) (pp. 329-330)

What was said in Gilbert v. Minnesota, supra, p. 27 in regard to advocating that citizens do not aid the United States in prosecuting a war, is equally applicable to acts in Pennsylvania encouraging persons to overthrow the government of the United States by force or violence.

In *Nelson v. Wyman*, 99 N.H. 33, quoted supra, the Court refused to follow the Pennsylvania Supreme Court in this Nelson case, and ruled that the Smith Act did not supersede the New Hampshire statute saying:

> "The enactment by Congress of the Smith Act (18 USC Sec. 2385), which defines and penalizes

sedition and subversive activities against the governments of the United States, the states or any of their subdivisions, does not preclude state legislation on the same subject matter. Insofar as Pennsylvania v. Nelson, 104 A. 2d 133, gives support to the proposition that it does, we do not adopt it." (105 A. 2d at p. 769)

In a recent decision, *Hamilton County, State of Ohio v. Raley et al.* (not yet reported) the Legislature had created an Un-American Activities Commission to investigate activities of "persons who have as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means; * * * or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government; * * *"

In a prosecution for contempt of the Commission, the defendant set up that by the Smith Act the United States had occupied the field and further that the act attempted to confer power to invade the national domain. The defendant cited the opinion of the majority of the Supreme Court of Pennsylvania in the instant case, but the higher Court refused to follow this opinion and held that the Ohio statute was not superseded and further agreed with the dissenting opinion of Mr. Justice Bell.

This Court has repeatedly held that the intent of Congress to supersede the exercise of the **police powers** of the states must be clearly manifested; and

that the repugnance and conflict must be so direct and positive that the two acts cannot be reconciled or consistently stand together.

Thus, in *Kelly v. Washington*, 302 U.S. 1 (1937), Chief Justice Hughes said:

> "* * * The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" (p. 10)

Other decisions to the same effect are:

Sinnot v. Davenport, 63 U.S. (22 How.) 227 (1859)

Missouri, Kansas and Texas Ry. Co. v. Haber, 169 U.S. 613, 623 (1898)

Reid v. Colorado, 187 U.S. 137, 148 (1902)

Missouri, Kansas and Texas Railway Company v. Harris, 234 U.S. 412, 419 (1914)

Allen-Bradley Local v. Board, 315 U.S. 740, 751 (1942)

This rule also applies if the argument is based on some contention that the scope of the Federal act is such as to indicate an intent to supersede a State statute.

In *Cloverleaf Co. v. Patterson*, 315 U.S. 148 (1942), Mr. Justice Reed said:

> **"When the prohibition of state action is not specific but inferable from the scope and purpose**

of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation." (Emphasis supplied) (pp. 155-156)

In *Schwartz v. Texas*, 344 U.S. 199 (1952), Mr. Justice Minton said:

"* * * If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed. * * * 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.' Reid v. Colorado, 187 U.S. 137, 148." (202-203)

In *Bethlehem Steel Co. v. State Board*, 330 U.S. 767 (1947), Mr. Justice Frankfurter said:

"* * * Federal legislation of this character must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual States, as reflecting the historic and persistent concerns of our dual system of government. * * * To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, be-

cause Congress can speak with drastic clarity whenever it chooses to assume full federal authority, completely displacing the States." (p. 780)

(b) There is no inconsistency or conflict at all between the Federal act and the Pennsylvania act.

The provision of each statute makes it a crime to commit acts for the purpose of overthrowing the government of the United States or of Pennsylvania by force or violence.

Even though the definitions of the crime of advocating overthrow of government by force are, in substance, identical, there is no conflict.

In *People of State of California v. Zook*, 336 U. S. 841 (1949), a California statute making it unlawful to sell interstate transportation of persons over State highways by carrier without a permit from the Interstate Commerce Commission and the Federal statute contained the same prohibition.

This Court held that the California statute was not superseeded or invalid, saying:

> "* * * But the fact of identity does not mean the automatic invalidity of State measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent. * * *" (844)

The Court further said that *United States v. Marigold*, 9 How. 560.

> "* * * made clear that 'the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against

both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.' * * *" (844)

We repeat the language from Gilbert v. Minnesota, 254 U.S. 325:

> "'**The same act, it was said, may be an offense or transgression of the laws of both' Nation and State, and both may punish it without conflict of their sovereignties**". (Emphasis supplied) (330)

See also Jerome v. United States, quoted *infra*, p. 54, and cases cited in Point III. (1)

In every decision holding that two convictions for the same act—one under an act of Congress and the other under a statute of a state—do not create double jeopardy, there is implicit a ruling that the federal law does not supersede the state law.

Each crime so defined is an offense against one sovereign only. For its own preservation, each government may separately prescribe and punish acts of sedition and acts so committed with intent to overthrow the state or federal government by force or violence.

As there is no conflict, each act can be enforced independently of the other, by officials of the United States and of Pennsylvania acting separately.

(c) The Federal government has not taken the position that the Smith Act superseded the Sedition Law of the states, and has not objected to the enforcement of these laws by the states.

The provisions of the Smith Act have been in force continuously since 1940. The so-called sedition provisions which the Act of May 16, 1918, 40 Stat. 553, added to the Espionage Act of June 15, 1917, 40 Stat. 217, were in force from 1918 to 1921. Nevertheless, no Federal court has questioned the validity of a state sedition law or, at any time, held that they were superseded by Federal legislation on the same subject.

(d) No decision holds that a state statute merely making an act a crime is superseded by an act of Congress making the same act a crime. Sedition is a well known crime so created by acts of Congress and by the statutes of many states. The decisions which hold a supersedure is made by an act of Congress have involved statutes which are primarily regulatory, and the criminal provisions are merely added as a penalty in order to compel obedience to the regulation. The question has been whether the regulatory provisions are in conflict.

For example, in *Hines v. Davidowitz*, 312 U.S. 52, both the Legislature of Pennsylvania and Congress had enacted statutes regulating the registration of aliens. What was held to be inconsistent was not the penal provisions of the State statute designed to aid in enforcement, but the regulatory provisions.

The Smith Act is not part of a departmental or regulatory system as was the act of Congress involved in the Hines case. Each of the statutes, the Smith Act and the Pennsylvania Sedition Act, creates a substantive crime independently of any administrative or statutory regulation. Each statute is complete in

itself and is not ancillary to any regulation or other statute or intended to be an aid in the enforcement thereof. As was said by Mr. Justice Hughes in *Savage v. Jones*, 225 U.S. 501 (1912):

> "* * * There is no question here of conflicting standards, or of opposition of state to Federal authority. * * *" (539)

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

An act of Congress amended the charter of the City of Washington so as to empower the corporation of the city to authorize the drawing of lotteries to raise funds for the improvement of the city, provided that the purpose of the expenditure was approved by the President of the United States. The Virginia law prohibited the sale of lottery tickets except those authorized by the laws of that State.

This Court held that the act of Congress did not interfere with the power of Virginia to prosecute for sale in Virginia of lottery tickets issued by the City of Washington.

Chief Justice Marshall said:

> "* * * To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which congress cannot be supposed to adopt lightly or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention

would be clearly and unequivocally expressed. An act, such as that under consideration, ought not, we think, to be so considered as to imply this intention, **unless its provisions were such as to render the construction inevitable.**" (442)

The ruling in *Hines v. Davidowitz*, 312 U.S. 52 (1941), was based solely on the special ground that the registration of aliens by Pennsylvania would interfere with the **foreign relations of the** United States.

This basis was clearly pointed out in the opinion which stated:

"* * * the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government * * *

"* * * the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, * * *

"* * * it is of importance that this legislation is in a field which affects **international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.** * * *

"* * * **Any concurrent state power** that may exist **is restricted to the narrowest of limits;** * * *

"* * * power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state

may have is subordinate to supreme national law. * * *" (pp. 66-68) (Emphasis supplied)

The Hines case was clearly narrowed and based upon the exclusive power of the Federal government in foreign relations in *Allen-Bradley Local v. Board*, 315 U.S. 740 (1942), in which Mr. Justice Douglas said:

"* * * In the Hines case, a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any 'concurrent state power that may exist is restricted to the narrowest of limits.' p. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases **where a State was exercising its historic powers over such traditionally local matters as public safety and order** and the use of streets and highways. Maurer v. Hamilton, supra, and cases cited. Here, we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard." (p. 749)

Again in *United States v. Pink*, 315 U.S. 203 (1942), Mr. Justice Douglas said:

"We recently stated in Hines v. Davidowitz, 312 U.S. 52, 68, that the field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority'; and that any state power which may exist 'is restricted to the narrowest of limits.' There, we were dealing with the question as to whether a state statute regulating aliens survived a similar federal statute. We held that it did not. Here, we are dealing with **an exclusive federal** function. * * *" (p. 232) (Emphasis supplied)

The Hines decision was a case **sui generis.**

In *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948), Mr. Justice Frankfurter said:

"* * * The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. See Hines v. Davidowitz, 312 U.S. 52, 66. * * *" (419)

In *Galvan v. Press*, 347 U.S. 522 (1954), Mr. Justice Frankfurter said:

"* * * Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. * * *" (531)

The Hines case has been distinguished but not followed.

In *Hill v. Florida*, 325 U.S. 535 (1945), Mr. Justice Frankfurter in his dissenting opinion made this comment on the Hines case:

> "* * * Even this conclusion evoked a weighty dissent, and one cannot read the Court's opinion without an awareness that **the case presented a close question.** Shortly after this decision we unanimously made it clear that Hines v. Davidowitz was not intended to relax the requirement of practical and effective conflict between a State law and a federal enactment before a State and police measure can be nullified, and that the international bearing of the circumstances made persuasive the finding of conflict in that case. * * *" (555)

We submit that in the Hines case this Court did not intend to strip the states of the power to protect persons and property and to punish for criminal acts in violation of such rights.

The Pennsylvania Alien Registration Law dealt with a special class of persons—citizens of foreign countries who were living in Pennsylvania and had not filed even a declaration of intent to become citizens of the United States and who are still subject to the sovereign power of a foreign nation and owe allegance thereto.

In *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947), Mr. Justice Jackson said:

> "* * * Thus, the subject matter is not so 'intimately blended and intertwined with responsi-

bilities of the national government' that its nature alone raises an inference of exclusion. Cf. Hines v. Davidowitz, 312 U.S. 52, 66." (772)

The rights of aliens in the United States and Pennsylvania have always been fixed by international law and by treaties. Among these rights so regulated have been the right to own property and carry on business, the right of access to the courts and protection against unequal taxation. Under the laws of foreign nations, an alien residing in this country is still subject to call for military service.

In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), Mr. Justice Jackson said:

> "So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. The state of origin of each of these aliens could presently enter diplomatic remonstrance against these deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices.
>
> "The alien retains immunities from burdens which the citizens must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties

which international law not only permits our Government to recognize but commands it to respect. In deference to it certain dispensations from conscription for any military service have been granted foreign nationals. They cannot, consistently with our international commitments, be compelled 'to take part in the operations of war directed against their own country.' In addition to such general immunities they may enjoy particular treaty privileges. (585-586)

* * * * * * * * *

"It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." (588-589)

The Pennsylvania Sedition Law applies to all persons within the territorial jurisdiction of that state, regardless of their place of birth or citizenship. That law is not concerned with foreign relations, but only with acts done within the territorial limitations of Pennsylvania. The law applies equally and without discrimination to aliens and citizens alike. In the instant case, no question is raised or involved in regard to the rights of aliens in Pennsylvania. The acts prohibited are the same and the rights of the accused are the same whether he be born in Pennsylvania or in a foreign country. In determining whether the

alien has violated the Sedition Law of Pennsylvania, nationality makes no difference. No contact with a foreign nation is involved. No rule of international law is invoked or applied.

This Court many times has sustained legislation by a state which treated aliens as a class and subjected them to restrictions not imposed upon citizens.

Each of the decisions cited on this question in the majority opinion of the court below was concerned with conflicts between regulatory, not criminal, provisions. The cases cited are the following:

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) dealt with the regulation of grain warehouses. The Act of Congress declared that "the power, jurisdiction and authority" of the Secretary "shall be exclusive with respect to all persons" licensed under the act (p. 233). Despite this express exclusion, this court held that the State was free to regulate all matters not regulated by the Federal statute (p. 287).

This decision should be read in connection with Rice v. Chicago Board of Trade, 331 U.S. 247, 253 (1947), decided on the same day, in which the Federal statute contained no declaration of exclusion and this court refused to determine the question of supersedure until actual conflict between a specific order of the State Commission and a regulation of the Secretary of Agriculture was shown.

Cloverleaf Co. v. Patterson, 315 U.S. 148 (1942).

This Court held (524) that the Federal statute regulated the entire manufacture of renovated butter, and

that an act of the State officials in condemning packing stock butter acquired by a manufacturer for use in the manufacture of renovated butter was inconsistent with the law and regulations.

In the same volume is *Allen-Bradley Local v. Board*, 315 U.S. 740 (1942), in which this Court held unanimously that an order of the Wisconsin Employment Relations Board to a union to cease mass picketing did not conflict with the National Labor Relations Act.

Pennsylvania Railroad Co. v. Public Service Commission of Pennsylvania, 250 U.S. 566 (1919). This Court held that a Pennsylvania statute forbidding the operation of any train consisting of United States mail cars without the rear end of the rear car being equipped with a platform was inconsistent with the regulations of the postmaster general, and that the rule requiring uniformity under the Commerce Clause applied.

Southern Railway Co. v. Railroad Commission of Indiana, 236 U.S. 439 (1915). This Court held that the Federal Safety Appliance Act regulated the whole subject of equipping cars with safety appliances, and that the State Commission could not collect a penalty for violation of a State statute. It was held that the subject was one requiring uniformity and the power of Congress under the Commerce Clause was exclusive.

Charleston and Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597 (1915). This Court held that the Carmack amendment to the Interstate

Commerce Act, which amendment made it the duty of the initial carrier to secure safe transportation of property on reasonable terms, was in conflict with the State statute which imposed a penalty of $50 for failure to pay a claim for loss within forty days, and that the State provision was invalid.

Napier v. Atlantic Coast Line, 272 U.S. 605 (1926). This court held that the broad power conferred upon the Interstate Commerce Commission under the Boiler Inspection Act extended to every part of a locomotive and superseded a Wisconsin statute which required the locomotive to be equipped with an automatic fire box door and a cab curtain.

New York Central Railroad Co. v. Winfield, 244 U.S. 147 (1917). This Court held that the Federal Employers' Liability Act regulating compensation for injuries to employes engaged in interstate commerce, dealt with a subject requiring one uniform rule, and that an award according to a different standard of liability under the New York Workmen's Compensation Act was invalid.

Allen-Bradley Local v. Board, 315 U.S. 740 (1942) has been summarized, supra, p. 46.

Hill v. Florida, 325 U.S. 538 (1945). This Court held that a Florida statute providing that no person shall be licensed as a "business agent" of a labor union unless he has been a citizen of the United States for more than ten years, was in irreconcilable conflict with the collective bargaining regulations of the National Labor Relations Act.

Savage v. Jones, 225 U.S. 501 (1912). The Federal Act of 1906 regulating foods and drugs prohibited false branding, but did not require publication of the ingredients. A manufacturer of foods for domestic animals sought an injunction to restrain enforcement of an Ohio State statute requiring a manufacturer to state on each package the ingredients of the product. This court held that the State statute was not superseded by the Federal Act.

Hines v. Davidowitz, 312 U.S. 52 (1941) was discussed supra, p. 45.

Bethlehem Co. v. State Board, 330 U.S. 767 (1947). This Court held that the National Labor Relations Board had asserted control of labor relations in general and that after it had refused to designate foremen as a bargaining unit, a State Labor Relations Board did not have jurisdiction to constitute foremen a proper bargaining unit.

The Federal Constitution left the administration of criminal justice with the states.

From the vantage ground of history, we find that prior to the Federal Constitution the states possessed and exercised complete police power over crimes of every sort. The Constitution of the United States set up no federal criminal code or body of criminal law. As was said by Mr. Justice Douglas in *Jerome v. United States*, 318 U. S. 101 (1943):

> "* * * Since there is no common law offense against the United States (United States v. Hudson, 7 Cranch 32; United States v. Gradwell, 243

U. S. 476, 485), **the administration of criminal justice under our federal system has rested with the states,** except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See United States v. Lanza, 260 U. S. 377; Hebert v. Louisiana, 272 U. S. 312. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." (pp. 104-105) (Emphasis supplied)

There are no federal crimes except those created by statute within the limited and enumerated powers of Congress. The Federal Constitution conferred upon Congress no general police power and no general power to prohibit or punish crime.

In *Rochin v. California*, 342 U. S. 165 (1952), Mr. Justice Frankfurter said:

"**In our federal system the administration of criminal justice is predominantly committed to the care of the States.** The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const., Art. I, § 8, cl. 18.

Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, §10, cl. 1, in the original Constitution, prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments." (p. 168) (Emphasis supplied)

Again, in *Malinsky v. New York*, 324 U. S. 401 (1945), Mr. Justice Frankfurter in a concurring opinion said:

"Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, **The Constitution left the domain of criminal justice to the States.** The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any 'Bill of Attainder' or 'ex post facto law.' Constitution of the United States, Art. I, §10. This freedom of action remained with the States until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government. Criminal justice was not withdrawn from the States and made the business of federal lawmaking. The Fourteenth Amendment merely restricted the freedom theretofore possessed by the States in the making and the enforcement of their criminal laws." (pp. 412-413) (Emphasis supplied)

To the same effect is *Irvine v. California*, 347 U. S. 128, 134 (1945).

The majority opinion cites the case of *Hines v. Davidowitz*, 312 U. S. 52, and says

> "* * * the act of Congress may touch a field in which the federal interest is so dominent that the federal system will be assumed to preclude enforcement of state laws on the same subject. * * *" (App. 68a, 377 Pa. at p. 65)

The Hines case was based on the exclusive power of Congress over foreign relations.

The majority opinion in the case at bar cites no case in which this court has held that the enactment of a federal statute making an act a crime supersedes a state statute making a similar act a crime.

The question whether a federal enactment creating a crime supersedes a state statute creating a similar crime must be determined in the light of the decisions which hold that the Federal "Constitution left the domain of criminal justice to the States" (*Malinski v. New York*, quoted supra at p. 55); and that "In our federal system the administration of criminal justice is predominantly committed to the care of the States" (*Rochin v. California*, quoted supra at p. 54); and that "the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress" (*Jerome v. United States*, quoted supra at p. 53).

The fundamental truth so authoritatively declared by this Court in these excerpts was recognized and embodied by Congress in positive enactment in section 3231.

Section 3231 of the Federal Code of Crimes and Criminal Procedure of 1948, expresses clearly the intent not to supersede the Pennsylvania Sedition Act.

Section 3231 provides:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." (p. 243)

The words "nothing in this title" mean Title 18 of the Federal Code of Crimes and Criminal Procedure. The title of the Act of June 25, 1948, 62 Stat. 683, is as follows:

> "An Act
>
> "To revise, codify, and enact into positive law, Title 18 of the United States Code, entitled 'Crimes and Criminal Procedure'." (p. 683)

"This title", therefore, includes every provision in the Federal Code relating to sedition and particularly Section 2385, quoted supra, p. 2.

"Jurisdiction", in this title, is the power to indict, try and punish crimes, and is not taken away or im-

paired. Crimes are all that this federal code deals with.

If "jurisdiction" of the courts of the several states, under the laws thereof, is not taken away or impaired, then the power of the Court of Quarter Sessions is not superseded or suspended by Section 2385 of the Federal Code.

The language of the second sentence of Section 3231, quoted above supra, is broad, general and all inclusive. No intent is evidenced to except or exclude State sedition acts.

Section 2385 of the Federal Code is clearly a law "in this title".

The Pennsylvania Sedition Act is included in "the laws thereof", that is, the laws of the several states.

Section 3231 is one of the most fundamental provisions in Title 18. This section is inserted in the title which deals with crimes and criminal procedure, and necessarily and indubitably applies to the jurisdiction of the courts of the several states to hear and determine cases involving crimes under the laws thereof. It is difficult to conceive of any action that takes away or impairs the jurisdiction of the State courts in criminal matters more completely than a ruling that a Federal statute has superseded a State statute defining and punishing a crime.

The very purpose of the second sentence was to avoid any implication that the first sentence took away or impaired the jurisdiction of the courts of the

states under the laws thereof. If a federal law superseded a state law it would precisely and completely take away the jurisdiction of the state court under such law. For so long as the supersedure continued, the state court could not proceed at all under the state statute or enforce the same in any way.

We, therefore, interpret Section 3231 to mean that it shall not take away or impair the jurisdiction of the State courts to hear and decide criminal cases if the crime is a violation of the State law.

We have cited decisions of this Court holding that a State may make it a crime to commit acts to overthrow the government of the United States.

Therefore, nothing in Title 18 of the Federal Code supersedes the Pennsylvania Sedition Act nor the jurisdiction of the Pennsylvania courts to enforce it.

Section 2385 of the Federal Penal Code and the Pennsylvania Sedition Act each deal solely with crime and criminal procedure, and, therefore, fall within the scope of the police powers of the respective governments.

III.

The defendant was not placed in double jeopardy.

Amendment V of the Federal Constitution provides:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *" (p. 30)

This provision does not apply because:

(1) The crime created by the Pennsylvania Sedition Act and the crime created by the Smith Act are not "the same offense".

This point was conclusively established in *Gilbert v. Minnesota*, quoted supra, in which this Court held that the offenses created by the Minnesota statute and by the Federal Espionage law were separate.

In *United States v. Lanza*, 260 U. S. 377 (1922), Mr. Chief Justice Taft said:

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. * * * Here the same act was an offense against the state of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and

> a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy." (382)

To the same effect see *Hebert v. Louisiana*, 272 U. S. 312, 314 (1926).

So, in *United States v. Lanza*, 260 U. S. 377 (1922), in discussing two convictions for the same act of the defendant under the Federal law and a statute of the State of Washington, Mr. Chief Justice Taft said:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." (382)

The Court expressly rejected any explanation that the prohibition amendment had authorized a proceeding by the State. Mr. Chief Justice Taft said:

> "To regard the amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amend-

ment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded. * * * " (381)

(2) The defense of double jeopardy is the defense of **former** jeopardy and can be set up only in a second or later trial. In the case at bar the defendant could not establish any defense of former jeopardy. The statement in the majority opinion (R. 59-60) that Nelson was later indicted and tried in the District Court of the United States is legally irrelevant.

(3) To fall within Amendment V both offenses must be against the Federal Government, not as here, one against Pennsylvania and the other against the United States. In *Jerome v. United States*, 318 U. S. 101 (1943), Mr. Justice Douglas said:

" * * * In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See United States v. Lanza, 260 U. S. 377; Hebert v. Louisiana, 272 U. S. 312. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." (pp. 104-105)

(4) Amendment V is a restriction upon the Federal government only, and not upon the states. This amendment does not apply at all to a trial in a State court. As Chief Justice Taft said in *United States v. Lanza*, 260 U. S. 377 (1922):

> "* * * * The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government (Barron v. City of Baltimore, 7 Pet. 243, 8 L. Ed. 672), and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority. * * * ". (382)

We find no provision in the Federal Constitution against "double jeopardy" unless there are two trials in courts of the United States. Under the facts of this case, Amendment V does not apply.

IV.

The Decision of the Supreme Court of Pennsylvania should be reversed.

The Commonwealth of Pennsylvania requests that this Court decide that Section 2385 of the Federal Code of Crimes (formerly the Smith Act) did not supersede Section 4207 of the Pennsylvania Penal Code of June 24, 1939 (formerly the Pennsylvania Sedition Act of June 26, 1919).

The ruling that the Act of Congress did supersede the Pennsylvania statute was the only question decided by the Supreme Court of Pennsylvania.

The opinion of Mr. Justice Jones refers to other questions but did not discuss or make any adjudication of the same. Mr. Justice Jones said:

> "But, with any or all of that, we need not now be concerned. * * * " (p. 63a)
>
> "The judgment is reversed and the indictment quashed." (p. 79a).

Respectfully submitted,

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